(2)

No. 96-1043

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

JERRY GILMORE, WARDEN,
PONTIAC CORRECTIONAL CENTER, *Petitioner*,

v.

DENNIS EMERSON, *Respondent.*

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

1. Whether the State waived application of amended 28 U.S.C. § 2254(d) by not raising its applicability in a timely manner.

2. Whether the court of appeals misapplied Strickland v. Washington when it concluded that Dennis Emerson was denied effective assistance of counsel at the sentencing phase of his capital murder trial.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent Dennis Emerson respectfully submits this brief in opposition to the petition for a writ of certiorari filed by Jerry Gilmore, Warden of Pontiac Correctional Center.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2254(a) provides:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

After the district court entered final judgment and the parties' cross-appeals were orally argued in the court of appeals, 28 USC § 2254(d) was amended by the Antiterrorism and Effective Death Penalty Act of 1996 (Pub. L. No. 104-132, 110 Stat. 121) ("Act") to provide:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

COUNTERSTATEMENT OF THE CASE

The statement of the case in the State's petition omits numerous facts necessary for consideration of the second question presented, in violation of Rule 14.1(g). The additional facts set forth below are material to consideration of the second question presented. The State's statement of the case also affirmatively misrepresents facts pertaining to the submission in the

state post-conviction proceeding of an affidavit by Dennis Emerson's trial counsel, as explained below.

1. At Dennis Emerson's state court capital sentencing hearing, Emerson's trial counsel, Cook County Assistant Public Defender James Sammons, presented no mitigating evidence, made no attack on the State's aggravating evidence, and presented no opening statement or closing argument on his client's behalf -- not even a plea for mercy. In the federal habeas corpus proceeding, Sammons admitted under oath that he did not conduct any investigation into the mitigating evidence that could have been introduced on Emerson's behalf, did not conduct any interviews of potential witnesses, did not prepare any opening statement or closing argument for the sentencing phase, and did not develop any theory or strategy for the sentencing phase of Emerson's trial. None of Sammons' failures to investigate or prepare were considered by the state post-conviction court because the state court refused to permit Emerson's post-conviction counsel to take Sammons' deposition.

2. If Sammons had conducted an investigation of the available mitigating evidence, he would have learned that Emerson came from a severely impoverished and troubled family background; that Emerson was a gunshot victim at the age of eight; that resulting medical problems caused Emerson to miss a year of school, stunting Emerson's educational and personal development; that Emerson was thereafter evaluated as being borderline retarded, with an I.Q. of 80; that Emerson was emotionally devastated by the death of his infant daughter, possibly strangled by her mother; and that Emerson, while incarcerated, was a model prisoner and

demonstrated rehabilitative potential. At least seven witnesses were available to present this mitigating evidence. The State has never challenged the truthfulness of this evidence, or denied that Sammons could have uncovered it had he bothered to conduct even a minimal investigation.

3. In affirming the district court's decision that Sammons' failure to investigate or present this mitigating evidence deprived Emerson of a fair sentencing hearing, Chief Judge Posner wrote for a unanimous court that at least "one juror in twelve" might find Emerson's life "so bleak, so deprived, so harrowing, so full of horrors ... as to reduce Emerson's moral responsibility ... to a level at which capital punishment would strike that juror as excessive or one or more jurors would think Emerson deserving of mercy." Emerson v. Gramley, 91 F.3d 898, 907 (7th Cir. 1996). In support of this conclusion, the court cited other recent Illinois cases in which the State sought the death penalty, but the finder of fact declined to impose it after hearing mitigation evidence similar to that available to, but neither investigated nor presented by, Emerson's trial counsel. Id. (citing People v. Starnes, 273 Ill. App. 3d 476, 480, 652 N.E.2d 1177, 1181 (1995), and People v. Morrow, 269 Ill. App. 3d 1045, 1047, 647 N.E.2d 1100, 1103, 1107 (1995)).

4. In support of its argument that Sammons' conduct was consistent with Emerson's "instructions," the State quotes a short colloquy from the transcript in which Sammons represented to the court that Emerson did not want him to present evidence or argument, followed by Emerson's statement that he had no evidence that he wanted to present himself. This excerpt from the transcript, however, must be read in the context of the entire record.

The day before the sentencing hearing, Sammons had conceded Emerson's guilt to the charge of capital murder in his closing argument.[1] Sammons had previously waived opening statement, had made no effort to attack the credibility of Emerson's sole accuser, and had presented no evidence of Emerson's alibi. Emerson was understandably disgusted with his lawyer's abysmal performance and stated on the record that he did not want Sammons filing "motions on my behalf."

When the sentencing hearing began, Sammons had done no investigation of mitigating evidence and had done nothing to prepare for the hearing. The State does not argue that this failure was consistent with Emerson's "instructions." Because Sammons "had failed to conduct any investigation, however brief, into the possible existence of mitigating circumstances ... Sammons could not advise Emerson whether to try to present evidence of such circumstances." 91 F.3d at 906 (emphasis in original). "Nor did either Sammons or the trial judge warn Emerson of the fell consequences of failing to establish some mitigating circumstances, without which ... a sentence of death was certain unless the jury disobeyed the judge's instructions." Id. Indeed, "[t]here were no warnings" of the consequences of not presenting mitigating evidence. No one told Emerson that "without an effort to persuade the jury to exercise lenity he was doomed." Id. Without legal advice, Emerson himself did not know "what an investigation of his personal history would bring out that might help him with the jury." Id.

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[1] Circuit Judge Ripple dissented from the majority's decision to uphold the district court's refusal to grant habeas relief with respect to Emerson's convictions. Emerson's pending certiorari petition (No. 96-7254) concerns the legal consequences of Sammons' unauthorized concession of Emerson's guilt in light of available evidence to support an acquittal.

This is the context in which the colloquy relied on by the State took place. The Seventh Circuit unanimously concluded that under these "unique circumstances," it could not be said "that Emerson would have refused to permit argument or evidence no matter what Sammons and the trial judge had said and done." Id. at 906-07. Accordingly, the Seventh Circuit rejected the State's argument that Sammons' conduct was consistent with Emerson's instructions and held that "Emerson's waiver of his procedural rights at the sentencing hearing cannot be considered a knowing waiver to which he should be held." Id.[2]

REASONS FOR DENYING THE WRIT

I. THIS COURT SHOULD NOT GRANT CERTIORARI TO DECIDE WHETHER THE STATE WAIVED APPLICATION OF AMENDED SECTION 2254(D) IN THE COURT OF APPEALS.

After the district court had entered final judgment granting Emerson relief from his death sentence (but not from his convictions), and after the parties' cross-appeals had been briefed, orally argued, and submitted for decision, Congress passed and the President signed the Act which, among other things, amended Section 2254(d). In the course of affirming the district court's judgment, the court of appeals remarked that the State had not, after the Act had become law, asserted that the Act had any application to the case. The court of appeals further remarked

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[2] In addition to the colloquy from the sentencing hearing, the State relies on an affidavit from Sammons filed during state post-conviction proceedings (not in the Illinois Supreme Court on direct appeal, as the State falsely claims). The affidavit does not cite the transcript, but states only in conclusory terms that Sammons believed that Emerson did not want Sammons to present mitigating evidence to the jury. Notably, Sammons' affidavit does not challenge any of the specific circumstances discussed above. The affidavit also asserts that Sammons had considered a "strategy" of stipulating that the evidence in aggravation and mitigation would be the same as at Emerson's first trial -- a remarkable strategy, given that no mitigating evidence was presented at the first trial and given that Emerson was sentenced to death in that proceeding.

that because the Act's changes to Section 2254(d) were not jurisdictional in nature, arguments based on the Act could be -- and had been -- waived. The State never sought rehearing or suggested rehearing en banc on this issue, even though such a petition would have been highly appropriate, given that the court of appeals had addressed this issue sua sponte.

In its first question presented, the State asks this Court to hold that it did not waive application of amended 28 U.S.C. § 2254(d), because application of that provision cannot be waived. The State contends that the amendment, which prohibits district courts from granting habeas relief unless certain prerequisites are met, actually eliminated district courts' subject matter jurisdiction over cases where those prerequisites for relief are not satisfied. The State further asks this Court to hold that the Seventh Circuit was required to apply the amendment retroactively to divest the district court of subject matter jurisdiction in this case, even though the amendment was not enacted until more than a year after the district court entered final judgment. This Court should not grant certiorari to review the court of appeals' passing remarks on this issue -- an issue that was neither briefed nor argued below.

1. *There is no conflict among lower court decisions with respect to the question presented.* The courts that thus far have considered the issue have unanimously held that application of the amendment to 28 U.S.C. § 2254(d) at issue here can be waived, because it does not affect the district courts' subject matter jurisdiction, but rather modifies the substantive legal standard that applies to habeas claims properly within the district courts' jurisdiction. Emerson, 91 F.3d at 900; Lindh v. Murphy, 96 F.3d 856, 865 (7th Cir. 1996) (en banc), cert. granted, 65 U.S.L.W. 3487 (January 14, 1997); Rehbein v. Clark, 94 F.3d 478, 481 n.4 (8th Cir. 1996); Davis v. Executive Director of Dep't of Corrections, 100 F.3d 750, 755 n.1 (10th Cir. 1996). Unless

and until some lower court reaches the opposite conclusion, there is simply no need for this Court to intervene in this case. See McCray v. New York, 461 U.S. 961, 961 (1983) (Stevens, J.). Even if the issue is thought to warrant review, it should be considered in a case where the issue has been throughly addressed in the lower courts.

2. *The decision below was manifestly correct.* The plain language of the 1996 amendment, this Court's decisions interpreting other amendments to Section 2254, and the legislative history surrounding adoption of the Act all confirm that the Seventh Circuit was correct when it observed that the 1996 amendment "affects the scope of federal judicial review of state court determinations rather than the power of review," and, as such, is an argument the State can waive by not raising it in a timely manner. 91 F.3d at 900 (emphasis added).[3]

The amendment to Section 2254(d) relied on by the State provides that "[a]n application for a writ of habeas corpus ... shall not be granted ... unless" one of two requirements is satisfied. (Emphasis added). Thus, the plain language of the amendment establishes a prerequisite for granting an application for a writ of habeas corpus, not a prerequisite for considering the merits of such an application.

This Court has long drawn a careful distinction between provisions of the habeas statute that are jurisdictional and provisions that delineate the scope of federal review. The jurisdictional requirements are set forth in Section 2254(a), which was not amended in 1996. Section 2254(a) provides that "a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the

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[3] The State of Illinois now routinely asserts in federal habeas litigation that federal courts are obligated to apply the amendments to Section 2254(d), therefore eliminating any waiver issue in future cases.

ground that he is in custody in violation of the Constitution or laws or treaties of the United States." See also 28 U.S.C. § 2241 (setting forth same jurisdictional prerequisites). In Brown v. Allen, 344 U.S. 443, 460-61 (1953), this Court explained that a court "entertains" a habeas petition if it considers the petition on the merits, even if it subsequently determines that a hearing is unnecessary. See also Hartford Fire Ins. Co. v. California, 509 U.S. 764, 813 (1993) (Scalia, J., dissenting) (recognizing distinction between subject matter jurisdiction to adjudicate a claim and substantive limitations of statute). Thus, "[b]y statute, a federal habeas court has jurisdiction over any claim that a prisoner is 'in custody in violation of the Constitution or laws' of the United States." Withrow v. Williams, 507 U.S. 680, 716 (1993) (Scalia, J., concurring in part and dissenting in part). See also J. Liebman & R. Hertz, Federal Habeas Corpus Practice and Procedure § 8.1 (2d ed. 1994), at 191. In interpreting another 1996 amendment, this Court reemphasized this longstanding distinction between federal courts' subject matter jurisdiction to "entertain" petitions for habeas corpus and the standards that govern whether such petitions should be granted. Felker v. Turpin, 116 S. Ct. 2333, 2337 (1996).

Once the prerequisites for subject matter jurisdiction are established, the district court then considers other statutory and judicially recognized limitations on habeas corpus relief. See 28 U.S.C. § 2243 (a judge "entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto"). These requirements affect the scope of federal review, but are not jurisdictional and can be waived by the State if they are not asserted in a timely manner. These requirements include the bar against retroactive application of new rules, the exhaustion

requirement, and the procedural default rule. See Schiro v. Farley, 510 U.S. 222, 228 (1994) (bar to retroactive application of new rules is not jurisdictional and can be waived); Estelle v. Smith, 451 U.S. 454, 468 n.12 (1981) (procedural default defense can be waived); Granberry v. Greer, 481 U.S. 129, 136 (1987) (exhaustion defense is not jurisdictional and can be waived); see also McCleskey v. Zant, 499 U.S. 467, 482 (1991) (State bears burden of pleading abuse of writ).

The distinction between jurisdictional requirements and substantive requirements for relief was carefully maintained in the 1996 amendments. Certain of the 1996 amendments delineate circumstances under which a judge is not "required to entertain" a petition or under which petitions "need not be entertained." 28 U.S.C. § 2244(a), (b). Other 1996 amendments -- including the amendment to Section 2254(d) at issue here -- simply delineate circumstances under which a court should not "grant" relief when adjudicating a petition within its jurisdiction. See 28 U.S.C. § 2254(d).

In the instant case, the State invites the Court to ignore this longstanding distinction between jurisdictional requirements and substantive limitations on the right to relief. This Court should reject the State's invitation. As this Court recognized in Felker, the implication of restrictions on federal courts' jurisdiction is not favored. 116 S. Ct. at 2338-39. Congress must expressly impose any such jurisdictional restrictions, and the 1996 amendment to Section 2254(d) does not do so.

The legislative history also supports the conclusion that the 1996 amendment to 28 U.S.C. § 2254(d) was not intended to be jurisdictional. Senator Kyl introduced another amendment to the same bill providing that "an application for a writ of habeas corpus on behalf of a person in custody pursuant to a judgment or order of a State court shall not be entertained by a

court of the United States unless the remedies in the courts of the State are inadequate or ineffective to test the legality of the person's detention." 141 Cong. Rec. S. 7803-1, S. 7829. The Senate rejected that amendment and instead approved the language ultimately codified in amended Section 2254(d), restricting the scope of federal review of the merits of federal claims, but placing no restrictions on federal judges' jurisdiction to "entertain" such claims. See id. at S. 7849.

3. *The decision below does not conflict with any of this Court's decisions.*

The State contends that the decision below conflicts with language in footnote 2 of this Court's decision in Sumner v. Mata, 449 U.S. 539 (1981), and with this Court's decision in Louisville & Nashville R.R. v. Mottley, 211 U.S. 149 (1908). In Sumner, this Court considered the effect of state court factual findings despite the State's failure to make any argument based on the effect of such findings in the court of appeals. In Mottley, this Court held that appellate courts have a duty to make sure that lower courts do not exceed their jurisdiction. The Seventh Circuit's statement in Emerson is not inconsistent with either of these precedents.

The district court in Sumner had denied habeas relief. Without considering the substantive limitations imposed by Section 2254, the court of appeals reversed and directed the district court to grant relief. A careful reading of Sumner makes clear that this Court was principally concerned with the Ninth Circuit's failure to "apply" the controlling substantive law as "mandated by the statute." 449 U.S. at 547. Although the Court referred in footnote 2 to the district court's "jurisdiction," id. at 547 n.2, it also referred to "certain limitations on [federal courts'] authority specifically set forth in 28 U.S.C. § 2254(d)," id. at 544, to "the limited nature of the review provided federal courts by 28 U.S.C. § 2254," id. at 541, to "the limited nature of

the review provided by § 2254," id. at 550 n. 3, and to "the role to be played by the federal courts in the exercise of the habeas corpus jurisdiction conferred ... by 28 U.S.C. § 2254." Id. at 543. The specific statutory provision at issue in Sumner, now amended and renumbered as 28 U.S.C. § 2254(e), created a rebuttable presumption of correctness for state court factual findings -- a presumption that can be overcome in eight different ways. This Court chastised the court of appeals for ignoring the statute's substantive provisions governing federal habeas review and therefore remanded for further consideration of the merits of the case. The Court said nothing about dismissing for want of subject matter jurisdiction, which is the "only function remaining to the court" if subject matter jurisdiction is lacking. Ex Parte McCardle, 74 U.S. (7 Wall.) 506, 514 (1869).

Moreover, whatever Sumner says about the nature of the 1966 amendments to Section 2254, it says nothing about the 1996 amendment at issue here. Sumner does not in any way question the longstanding distinction between jurisdictional prerequisites for considering habeas petitions and substantive limitations on federal habeas courts' authority to grant relief. Nor does Sumner hold that all provisions of Section 2254 are jurisdictional and hence not waivable. Indeed, this Court's more recent subsequent decisions clearly establish that many substantive limitations on habeas relief are not jurisdictional and can be waived. See, e.g., Granberry, 481 U.S. at 136.

For the reasons explained above, the Act's amendment to Section 2254(d) cannot plausibly be read as affecting district courts' subject matter jurisdiction, let alone as divesting district courts of subject matter jurisdiction after the entry of final judgment in the district court. The district court issued the writ with respect to Emerson's sentence and entered final judgment

more than a year before the Act became law. Thus, the Seventh Circuit's comment that amended Section 2254(d) "affects the scope of federal judicial review of state court determinations rather than the power of review" is not inconsistent with this Court's decisions.

4. *Certiorari should be denied because application of amended Section 2254(d) would not affect the result in this case.* Even if one assumes, arguendo, that the Seventh Circuit's comment with respect to whether Section 2254(d) is jurisdictional was incorrect, certiorari should nevertheless be denied, because application of the amended version of Section 2254(d) to the facts of this case would not affect the result. Pursuant to amended Section 2254(d), a federal court may not issue a writ of habeas corpus "with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." Even if amended Section 2254(d) applied to Emerson's petition, it would not affect the result in this case because (1) the Illinois state courts never considered the merits of the claim on which Emerson was ultimately granted relief, (2) even if the Illinois Supreme Court's decision on direct appeal is regarded as a decision on the merits of Emerson's claim of ineffective assistance of counsel at sentencing, that decision was contrary to this Court's precedents or involved an unreasonable application of those precedents, and (3) to the extent that the Illinois Supreme Court's decision on direct appeal is regarded as containing any determinations of fact, such determinations were unreasonable.

On direct appeal, Emerson contended that Sammons' failure to present mitigating evidence constituted ineffective assistance of counsel. The Illinois Supreme Court rejected that argument, holding that "failure to present any evidence in mitigation does not automatically constitute ineffective assistance of counsel," and noting that the record before the court did not reveal what mitigating evidence, if any, was available. People v. Emerson, 122 Ill. 2d 411, 439, 522 N.E.2d 1109, 1120 (1987) (emphasis added). Under Illinois law, Emerson was not permitted to place the available mitigating evidence before the court on direct appeal, because that evidence was not part of the trial record. See, e.g., People v. Morris, 229 Ill. App. 3d 144, 166, 593 N.E.2d 932, 947, appeal denied, 146 Ill. 2d 644, 602 N.E.2d 468 (1992) (refusing to consider ineffective assistance of counsel claim based on trial counsel's failure to investigate possible alibi witnesses); People v. Reimolds, 92 Ill. 2d 101, 106-07, 440 N.E.2d 872, 875 (1982) (scope of direct appellate review is limited to matters appearing from the face of the trial record). Nor did Emerson have the opportunity to develop or supplement the record with facts concerning his Sammons' failure to investigate available mitigating evidence, failure to prepare for the capital sentencing hearing, and failure to advise Emerson as to the consequences of not presenting mitigating evidence.

Accordingly, the Illinois Supreme Court could not and did not consider on direct appeal any claim of ineffective assistance of counsel at sentencing based on Sammons' failure to investigate or present specific mitigating evidence, failure to prepare for the sentencing hearing, or failure to advise Emerson about the consequences of not presenting such evidence. This claim was presented at every stage of Emerson's state post-conviction proceedings, but the state courts refused to consider the claim on the merits. Therefore, the claim on which Emerson prevailed in

the federal district court and the court of appeals -- a claim of ineffective assistance of counsel at sentencing based on Sammons' failure to investigate and present specific, available mitigating evidence and failure to advise Emerson as to the consequences of not presenting such evidence -- was never "adjudicated on the merits in State court proceedings," and amended Section 2254(d) therefore has no application to Emerson's claim.

Even if the Illinois Supreme Court's decision on direct appeal is regarded as an adjudication on the merits of Emerson's claim of ineffective assistance of counsel at sentencing, that decision was contrary to or based on an unreasonable interpretation of established federal law as established by this Court. Remarkably, the Illinois Supreme Court's decision on direct appeal neither discusses nor cites this Court's seminal decisions concerning ineffective assistance of counsel in Strickland v. Washington, 466 U.S. 668 (1984), and United States v. Cronic, 466 U.S. 648 (1984). The Illinois Supreme Court completely ignored this Court's recognition in Strickland that trial counsel's effectiveness should be assessed based on "all the circumstances." See Strickland, 466 U.S. at 691. Instead, it purported to consider Sammons' effectiveness based solely on circumstances apparent from the trial transcript or the record on direct appeal. The Illinois Supreme Court also ignored this Court's determination that an attorney's strategic decision made after less than complete investigation are entitled to deference only "to the extent that reasonable professional judgment supports the limitations on the investigation." Id. Furthermore, the Illinois Supreme Court purported to construe isolated comments by Emerson as a waiver of Emerson's right to present mitigating evidence, without determining that Emerson's waiver was intelligent, voluntary, and knowing, as required by numerous decisions of this Court. See Johnson v. Zerbst, 304 U.S. 458, 465 (1938); Gardner v. Florida, 430 U.S. 349, 361 (1977); Schneckloth

v. Bustamonte, 412 U.S. 218, 237-38 (1973); Brady v. United States, 397 U.S. 742, 748 (1970); Brookhart v. Janis, 384 U.S. 1, 7 (1966); Von Moltke v. Gillies, 332 U.S. 708, 729 (1948); Glasser v. United States, 315 U.S. 60, 71 (1942).

Under these circumstances, the Illinois Supreme Court's rejection of Emerson's claim of ineffective assistance of counsel at sentencing -- even if it is regarded as an adjudication of the claim on which Emerson subsequently obtained relief in federal court -- was clearly contrary to this Court's precedents or based on an unreasonable interpretation of those precedents. Indeed, the Seventh Circuit's unanimous conclusion that Emerson was deprived of the effective assistance of counsel at sentencing was based squarely on Strickland, not on subsequent decisions of the Seventh Circuit or other inferior federal courts. Accordingly, Emerson would have been entitled to relief even if amended Section 2254(d) applied.

Finally, to the extent the Illinois Supreme Court adjudicated Emerson's claim of ineffective assistance of counsel at sentencing, and to the extent that court's decision is regarded as containing any determinations of fact, such determinations were plainly unreasonable. The only conceivable factual determination on this issue was the Illinois Supreme Court's observation on direct appeal that "counsel's conduct at the sentencing hearing was consistent with the defendant's stated wishes." Emerson, 122 Ill. 2d at 439-40, 522 N.E.2d at 1121. As the Seventh Circuit explained in its decision below, this conclusion was patently unreasonable, in light of all the circumstances, including Sammons' concession of guilt in closing argument the day before sentencing, Emerson's resulting loss of confidence in Sammons, Sammons' failure "to conduct any investigation, however brief, into the possible existence of mitigating circumstances," Sammons' failure to "advise Emerson whether to try to present evidence of such circumstances," the failure

of both Sammons and the trial judge to "warn Emerson of the fell consequences of failing to establish some mitigating circumstances," and Emerson's ignorance of "what an investigation of his personal history would bring out that might help him with the jury." Emerson, 91 F.3d at 906-07. As the Seventh Circuit concluded, in light of all of these circumstances, it is simply not reasonable -- or even "possible" -- to say "that Emerson would have refused to permit argument or evidence no matter what [trial counsel] or the trial judge had said and done." Id. at 906. Any purported factual determination to the contrary was wholly unreasonable. For this reason as well, Emerson would be entitled to relief even under the new standard set forth in amended Section 2254(d), and granting certiorari to decide whether that standard should have been applied to Emerson's case would therefore not affect the outcome of this case.

II. THIS COURT SHOULD NOT GRANT CERTIORARI TO REVIEW A CLAIM THAT THE COURT OF APPEALS MISAPPLIED STRICKLAND V. WASHINGTON.

The State's second question in reality presents nothing more than a contention that the Seventh Circuit misapplied a properly stated rule of law to the facts of this case. Contrary to the State's assertions (Pet., pp. 11, 14), the Seventh Circuit did not hold that Sammons was *per se* ineffective for failing to present mitigation evidence at the capital sentencing hearing. Instead, the Seventh Circuit expressly recognized that in certain circumstances, it may be a sound defense strategy not to offer evidence of mitigating circumstances. Emerson, 91 F.3d at 906 (citing Darden v. Wainwright, 477 U.S. 168, 186 (1986)). In this case, however, Sammons' admitted failure to investigate any of the extensive available mitigating evidence rendered him totally incapable of discharging his professional obligation to advise Emerson as to the propriety of not

presenting such evidence and thereby "brought his representation of Emerson well below the minimum level of representation." Id. (citing Burger v. Kemp, 483 U.S. 776, 790-95 (1987)).

As it did below, the State insists that Sammons' failure to present mitigating evidence was appropriate in light of Emerson's "express desires" not to introduce such evidence. (Pet., p. 15). As explained in more detail, at pages 4-6, supra, the Seventh Circuit expressly considered Emerson's statements and concluded that Emerson's purported "waiver" of his constitutional right to put on mitigating evidence "cannot be considered a knowing waiver to which he should be held." Emerson, 91 F.3d at 906. This Court has expressly recognized the need for waivers of fundamental constitutional rights to be "intelligently, voluntarily, and knowingly" made. Johnson, 304 U.S. at 465.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the State's petition for a writ of certiorari be denied.

Respectfully submitted,

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February 3, 1997

William K. Suter
Clerk of Court
Supreme Court of the United States
One First Street, N.E.
Washington, D.C. 20543

Re: Gilmore v. Emerson (No. 96-1043)

Dear Mr. Suter:

Enclosed for filing are an original and eleven copies of respondent Dennis Emerson's Brief in Opposition to the Petition for a Writ of Certiorari filed by Jerry Gilmore; Proof of Service of the brief; an original and eleven copies of a Motion for Leave to Proceed In Forma Pauperis; and Proof of Service of the Motion.

Please file stamp and return the extra copy of the Brief in Opposition and the Motion for Leave to Proceed In Forma Pauperis in the envelope provided. Thank you.

Sincerely,

Linton J. Childs

Linton J. Childs

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

Enclosures
cc: All Counsel of Record

No. 96-1043

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

JERRY GILMORE, WARDEN,
PONTIAC CORRECTIONAL CENTER, *Petitioner*,

v.

DENNIS EMERSON, *Respondent.*

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit.

PROOF OF SERVICE

I, Jeffrey B. Charkow hereby certify that on this 3rd day of February, 1997, three pies of Dennis Emerson's Brief in Opposition to Petition for a Writ of Certiorari in this case re mailed, first class postage prepaid, to James E. Ryan, Attorney General of the State of nois, 100 West Randolph Street, 12th Floor, Chicago, Illinois 60601, Phone: (312) 814-3000; leen C. Anderson, Assistant Attorney General, 100 West Randolph Street, 12th Floor, icago, Illinois 60601, (312) 814-2232; and to Richard A. Devine, Cook County State's torney, 309 Richard J. Daley Center, Chicago, Illinois 60602, Phone (312) 443-5440, counsel r the Petitioner herein. I further certify that all parties required to be served have been served.

BEST AVAILABLE COPY